Supreme Court, U.S.
FILED

No. _____

06-821 DEC 19 2006

In The

OFFICE OF THE CLERK

Supreme Court of the United States

MICHAEL A. LATHER, JR.,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a *Miranda* Waiver is valid where after reading the warnings to the accused, the Police Officers did not explicitly ask if the accused understood or waived the rights under circumstances that would require the Trial Court to make a simultaneous finding of both an implied understanding of the *Miranda* rights and an implied waiver of the *Miranda* rights.

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OPINION BELOW

The Decision of the Ohio Supreme Court is reported at 110 Ohio St. 3d 270, 2006-Ohio-4477. A copy of the Decision is reprinted at Appendix pages 1-8.

JURISDICTION

The Ohio Supreme Court filed its Decision on September 13, 2006. This Court has jurisdiction under 28 U.S.C. § 1257 to review a State Court's Decision on a Writ of Certiorari.

STATEMENT OF CASE

This case arises from an Indictment filed, on September 6, 2001, in the Sandusky County Court of Common Pleas charging Petitioner, Michael A. Lather, Jr., with Trafficking in Crack Cocaine in violation of Ohio Revised Code § 2925.03(A)(1), (C)(4)(f), a First Degree Felony. Petitioner entered a Not Guilty Plea. Subsequently, Petitioner filed a Motion to Suppress all evidence seized during the search of Petitioner's apartment and vehicle, and any and all statements made by Petitioner following his arrest, in the Trial Court.

The facts regarding said statements are as follows:

On August 17, 2001, Petitioner was arrested in Fremont, Sandusky County, Ohio, following a traffic stop, for allegedly trafficking in crack cocaine; thereafter, on August 31, 2001, the Ottawa County Sheriff's Department, concerning an unrelated drug investigation involving Petitioner, obtained a Search Warrant through

Sandusky County Court of Common Pleas to execute on Petitioner's alleged residence.

Pursuant to the Ottawa County Arrest Warrant, Petitioner, was arrested on August 31, 2001, and returned to his alleged apartment so he could be present during the execution of the Search Warrant. Officer Woolf testified that he "*Mirandized*" Petitioner, by reading from an "Advice of Rights" form. Officer Woolf testified that he did not ask Petitioner if he understood his rights, and he did not ask Petitioner if he wished to waive his rights. Officer Woolf also testified that he did not read the Waiver of Rights language on the back of the "Advice of Rights" form. Officer Woolf stated that it was "standard protocol" for the arresting officer, in this case Sergeant Garza, to read the suspect his *Miranda* Warnings. Officer Woolf acknowledged that he never confirmed that Sergeant Garza, in fact, read Petitioner his rights. Finally, Officer Woolf stated that he did not interrogate Petitioner.

Ottawa County Detective St. Clair testified that, during the search, after he found the digital scale he asked Petitioner what he used it for. Petitioner responded that the prior renter had left it. After Detective St. Clair found two (2) additional scales, he asked Petitioner if they were his, Petitioner again responded that the prior tenant had left them and he stated that they were not working.

Detective St. Clair stated he did not read Petitioner his rights; further, Detective St. Clair testified that he asked Officer Woolf if he had read Petitioner his rights, and relied on Officer Woolf's representation that he had. Detective St. Clair did nothing to independently verify that Petitioner understood his rights and waived them.

In this case, Officer Woolf unequivocally testified that he neither asked Petitioner if he understood his rights, nor asked Petitioner if he wished to waive his rights. Thereafter, Detective St. Clair, without apprizing Petitioner of his rights, questioned him about the digital scales found in the apartment. Both the Ohio Supreme Court and the Court of Appeals acknowledged and found that Petitioner had prior contacts with the criminal justice system and had recently been arrested, and that the Petitioner had also competed high school and some college.

On October 24, 2002, following the Hearing on the Motion to Suppress, the Trial Court Denied Appellant's Motion, and allowed all of the Petitioner's statements to be admitted at trial. Petitioner's statements, thus, were improperly admitted at Trial, along with the three (3) digital scales that were seized on August 31, 2001. (Trial Court's decision, Appendix pages 21-23).

The case then proceeded to jury trial on November 21, 2002 which resulted in a Hung Jury.

A second Jury trial commenced on January 29, 2003, and Petitioner was found Guilty. On February 5, 2003, Petitioner was sentenced to seven (7) years of imprisonment and a $7,500.00 mandatory fine.

The Court of Appeals reversed the Petitioner's Conviction based on *Miranda*. *State v. Lather,* 6th Dist. App. No. S-03-008, 2005-Ohio-668 (Appendix pages 9-20).

It is important to understand when reviewing the decisions of the Trial Court, the Court of Appeals, and the Ohio Supreme Court regarding the Suppression Hearing, that the Hearing involved issues regarding a Motion to Suppress evidence which the Defendant had alleged was

unlawfully obtained through an improper search warrant and due to improper custodial interrogations on both August 17, 2001 and on August 31, 2001, which involved two (2) different alleged drug crimes and two (2) different and separate criminal investigations by two (2) different Law Enforcement agencies. The incident on August 17, 2001 involved the investigation by Officer Woolf of the Fremont Police Department, and the incident on August 31, 2001 involved the investigation by Detective St. Clair of the Ottawa County Sheriff's Department.

It is extremely clear from the evidence adduced at the hearing that on August 31, 2001, that neither Officer Woolf, nor Detective St. Clair, ever did anything to determine whether the Petitioner had understood the *Miranda* rights before being questioned by Detective St. Clair, while in custody and under arrest, and answering the questions as to the ownership of the three (3) electronic scales found during the search (i.e., that the scales had been left at the apartment by a prior tenant and that two (2) of the scales did not work); nor had either officer determined whether the Petitioner had knowingly, intelligently, and voluntarily waived the *Miranda* rights. Both officers acknowledged that neither officer attempted to determine the same, by any written form, verbally, or independently by any other means. In fact, Detective St. Clair relied on Officer Woolf's having determined the same, and Detective St. Clair did absolutely nothing to determine that the Petitioner understood or waived his *Miranda* rights, and Officer Woolf was very clear in his testimony that he had not determined the Petitioner understood or waived his *Miranda* rights by any means whatsoever.

REASONS FOR GRANTING THE PETITION

This Honorable Court should decide and settle the important federal issue, not yet ruled upon by this Honorable Court, of whether a *Miranda* Waiver is valid where after reading the warnings to the accused, the Police Officers did not explicitly ask if the accused understood or waived the rights under circumstances that would require the Trial Court to make a simultaneous finding of both an implied understanding of the *Miranda* rights and an implied waiver of the *Miranda* rights.

The Ohio Supreme Court in deciding *Lather* stated as follows (at paragraph #5): "We reverse the judgment of the court of appeals and hold that a suspect need not be asked directly whether he or she understands the *Miranda* warnings before an understanding waiver of *Miranda* rights may be inferred from the totality of the circumstances."

The Ohio Supreme Court has now allowed what no other Court, not this Honorable Court, nor any other State Supreme Court, has ever before allowed in rendering this decision, which is to allow simultaneously both an implied understanding by the accused of the *Miranda* rights and an implied waiver by the accused of the *Miranda* rights. Numerous prior cases interpreting *Miranda* have allowed an implied understanding of the *Miranda* rights if there is a clear waiver of said rights ***or*** have allowed an implied waiver of the *Miranda* rights if there is a clear understanding of said rights, but not both implications simultaneously. There is no valid reason, legally, or based on public policy, police procedure, or otherwise, to extend any of the prior holdings of this Court to allow for such an interpretation allowing simultaneously, both an implied

understanding of the *Miranda* rights, and an implied waiver by the accused of the *Miranda* rights, as in allowing simultaneously, both an implied understanding, and an implied waiver of the *Miranda* rights, would negate the safeguards required by the Constitution of the United States, to the right to counsel and the privilege against self incrimination, and the safeguards required by *Miranda*.

This Honorable Court in deciding *Dickerson v. United States*, 530 U.S. 428 (2000), found *Miranda* to be a Constitutional decision of this Court and declined to overrule *Miranda* as "Miranda has become so embedded in routine police practice to the point where the warnings have become part of our national culture."

According to *Miranda v. Arizona*, 384 U.S. 436 (1966), before a suspect in police custody is questioned, the suspect: "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in the Court of Law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

A suspect may waive his *Miranda* Rights provided his waiver is knowing and voluntary. *Edwards v. Arizona*, 451 U.S. 477, 483 (1981). In *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), the United States Supreme Court explained:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is

> not one of form, but rather whether the Defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the Defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a Defendant has waived his rights. The Court must presume that a Defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

The issue of waiver is determined by the totality of the circumstances in each case, including the Defendant's background, experience and conduct. Id. The State is required to prove that the suspect waived his right to remain silent by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157 (1986).

As set forth above, a *Miranda* Waiver need not be expressly made in order to be valid. However, even if the waiver is implied, it must be shown that the suspect, in fact, knowingly and voluntarily waived his rights before making the statement. *State v. Scott*, 61 Ohio St. 2d 155 (1980), paragraph one (1) of the syllabus, following *North Carolina v. Butler*, 441 U.S. 369 (1979).

In *Tague v. Louisiana*, 444 U.S. 469 (1980), the United States Supreme Court concluded that the Petitioner's inculpatory statement was erroneously admitted into evidence where the arresting officer could not recall if he asked Petitioner whether he understood the rights as read to him. In *Tague*, the Louisiana Supreme Court concluded that the arresting officer "is not 'compelled to give an intelligence test to a person who has been advised of his

rights to determine if he understands them * * * .'" Id. at 469-470, quoting 372 So. 2d 555, 557. Reversing the majority, the United States Supreme Court, concurred with the dissent's analysis, quoting:

> '* * * the majority today created a presumption that the Defendant understood his constitutional rights and places the burden of proof upon the Defendant, instead of the State, to demonstrate whether the Defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' Id. at 470, quoting 372 So. 2d at 558.

The Court of Appeals' ruling in determining that the Defendant's statements should have been suppressed by the Trial Court and remanding this case for a new trial was stated by the Sixth District Court of Appeals at page 11 of its decision as follows:

> In this case, Officer Woolf unequivocally testified that he neither asked appellant (Petitioner herein) if he understood his rights nor asked the appellant if he wished to waive his rights. Thereafter, Officer St. Clair, without apprising appellant of his rights, questioned him about the digital scales found in his apartment. We do acknowledge that appellant had prior contacts with the criminal justice system and had recently been arrested; appellant has completed high school and some college. However, in order for appellant to, at a minimum, impliedly waive his *Miranda* rights, it must be shown that he understood those rights. Such an understanding may not be presumed. Accordingly, we find appellant's first assignment of error well taken, in part, as it relates to the August 31, 2001 interrogation.

Further, in its ruling the Court of Appeals on the last page of its opinion stated that because the Defendant's statements were (improperly) admitted at trial, and because, after review of the entire record, the Appellate Court believed that the evidence of the Defendant's guilt was not overwhelming, the Appellate Court found that this matter must be remanded for a new trial. This is especially important considering that this matter was tried twice to two (2) different Juries, and the first jury trial resulted in a hung jury, and both juries received the same improper statements as evidence.

The opinion of the Sixth District Court of Appeals followed this Honorable Court's prior decisions regarding *Miranda* since the State did not meet its burden of proving through any evidence admitted at the Suppression Hearing that the Defendant understood the *Miranda* rights on August 31, 2001, and thus an implied waiver of the *Miranda* rights could not legally occur under those circumstances. The Sixth District Court of Appeals simply reviewed the evidence submitted during the suppression hearing, and determined that based on a "totality of the circumstances" that the State had not met its burden that the Defendant had knowingly, intelligently, and voluntarily waived the *Miranda* rights.

This Honorable Court should settle and resolve this very important federal question, which has not yet been decided by this Court, and not allow any further erosion of the safeguards required by *Miranda* which the decision of the Ohio Supreme Court has now allowed.

CONCLUSION

The Court should Grant the Petition for a Writ of Certiorari and Reverse the Decision of the Ohio Supreme Court.

Respectfully submitted,

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110 Ohio St.3d 270, 2006-Ohio-4477
853 N.E.2d 279

THE STATE OF OHIO, APPELLANT, *v.* LATHER, APPELLEE.

Criminal law – Miranda warnings – Waiver – That a defendant understood his Miranda rights may be inferred from totality of circumstances.

(No. 2005-0400 – Submitted February 7, 2006 – Decided September 13, 2006.)
APPEAL from the Court of Appeals for Sandusky County, No. S-03-008, 2005-Ohio-668.

LANZINGER, J.

{¶ 1} In this case, which we accepted as a discretionary appeal, the issue is whether a defendant's understanding of *Miranda* rights may be implied or must instead be stated explicitly. We hold that a suspect need not be asked directly whether he or she understands *Miranda* rights but that an understanding waiver of those rights may be inferred from the totality of the circumstances.

Factual background

{¶ 2} The appellee, Michael Anthony Lather Jr., was arrested in Fremont, Ohio for trafficking in crack cocaine. He was taken to the Fremont Police Department. After receiving *Miranda* warnings from Officer Timothy F. Woolf, Lather signed a form stating that he understood those rights and wished to waive them. He then gave a statement.

{¶ 3} Two weeks later, as a result of an unrelated drug investigation, Lather's residence was searched by the

Ottawa County Sheriff's Department. Lather was detained at his apartment by Woolf, who read him the *Miranda* warnings but did not ask Lather explicitly whether he understood those rights. After first verifying with Woolf that Lather had been given the appropriate warnings, Detective Douglas St. Clair of the Ottawa County Sheriff's Department asked Lather whether he owned a digital scale that was found during the search. Lather said that the scale had been left by the previous renter. During the search, two more scales were found, and St. Clair asked Lather whether they were his. Lather responded that the scales were the property of the prior renter and that they did not work.

{¶ 4} After being indicted for trafficking in crack cocaine, Lather filed a motion to suppress his two statements to law enforcement and the evidence found during the search of his apartment. The trial court, after a hearing, denied the motion. Lather was convicted of the trafficking charge and appealed. The Court of Appeals for Sandusky County reversed Lather's conviction and remanded the cause for a new trial on grounds that "in order for [Lather] to, at minimum, impliedly waive his *Miranda* rights, it must be shown that he understood those rights. Such an understanding may not be presumed." *State v. Lather,* 6th Dist. No. S-03-008, 2005-Ohio-668 at ¶ 40.

{¶ 5} In this appeal, the state of Ohio raises one proposition of law: "A Miranda waiver is valid where after reading the warnings to the accused, officers did not explicitly ask if defendant understood the rights, under circumstances that indicated the accused actually understood those rights and voluntarily waived them." We reverse the judgment of the court of appeals and hold that a suspect need not be asked directly whether he or she understands

the *Miranda* warnings before an understanding waiver of *Miranda* rights may be inferred from the totality of the circumstances.

Legal analysis

{¶ 6} A suspect in police custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona* (1966), 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶ 7} Of course, one may waive or relinquish a known right. In the context of *Miranda,* the United States Supreme Court has explained the two aspects of waiver. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine* (1986), 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410, quoting *Fare v. Michael C.* (1979), 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197.

{¶ 8} We have also recognized that to meet the first aspect of a voluntary waiver, the waiver must be noncoercive. "A suspect's decision to waive his Fifth Amendment

privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, at paragraph two of the syllabus. There is no coercion alleged in Lather's case. Instead, this case involves the second aspect of the waiver test, whether the waiver was made with full awareness.

{¶ 9} The court of appeals reversed the conviction and remanded Lather's case for a new trial because it did not see explicit evidence that Lather had understood his rights. The court held that understanding could not be "presumed." We have held, however, that a court may infer from the totality of the circumstances that a defendant voluntarily, knowingly, and intelligently waived his rights. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 853; *State v. Gapen,* 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 52. The totality of the circumstances includes "'e.g., the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Dixon,* 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 25, quoting *State v. Eley* (1996), 77 Ohio St.3d 174, 178, 672 N.E.2d 640. By definition of "totality," a court is to look to *all* of the evidence to determine a suspect's understanding, which can be implied by his conduct and the situation.

{¶ 10} We have already held that *Miranda* warnings were proper and the confession was voluntary when a suspect was advised of his *Miranda* rights but never asked for a further explanation of them. *State v. Foust,* 105 Ohio

St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶ 71-72. In *Foust,* we found significant that the suspect appeared to be mentally alert, that he was not under the influence of drugs or alcohol at the time of the interview, and that he stated during the police interview that he had completed a GED course and had the highest score in his class. Id. at ¶ 73. The totality of the circumstances supported the validity of waiver.

{¶ 11} We also indicated in *State v. Murphy* (2001), 91 Ohio St.3d 516, 518, 747 N.E.2d 765, that "[i]t is settled law that a *Miranda* waiver need not be expressly made in order to be valid. *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286, 292. A court may infer a waiver from the suspect's behavior, viewed in light of all the surrounding circumstances."

{¶ 12} In a situation similar to Lather's, the Court of Appeals for the Fourth Circuit concluded that the defendant had made an intelligent, knowing, and voluntary waiver even though he did not make a statement – written or oral – that he understood his rights. *United States v. Hayes* (C.A.4, 1967), 385 F.2d 375, 377-378. In reaching its conclusion, the court examined the totality of the circumstances surrounding the defendant's statements, relying on the lack of any allegation of coercion and the defendant's mental alertness at the time of his arrest.

{¶ 13} Although it may not seem overly burdensome, and perhaps would be better practice, for law enforcement officers to ask specifically whether a suspect understands his or her rights, *Miranda* does not require it. A court must review the totality of the circumstances in the case to determine whether a waiver of rights has occurred. These circumstances may include the suspect's level of

education, previous contact with police, and any other factor deemed by the court to be relevant, including the substance of the statement itself.

{¶ 14} On the day he was detained at his apartment, Lather was 26 years old. He was well educated: he graduated from Fremont Ross High School in 1994, went to Terra Community College for two semesters, and majored in business management. Lather testified that he was familiar with the *Miranda* warnings. He had a criminal record and a number of contacts with law enforcement. He had been read his *Miranda* warnings two weeks before, had signed a form stating that he understood his rights and wished to waive them, and then had given a statement to police. On the day he was detained at his home, Lather was sober and did not ask for a further explanation or protest that he did not understand his rights. The statements that he did make were intended to exculpate him or at least lessen his culpability. From this evidence of the totality of the circumstances the trial court could infer that a valid waiver of Lather's *Miranda* rights had occurred. An understanding waiver of *Miranda* rights may be inferred from the totality of the circumstances.

{¶ 15} Finding that the court of appeals erred, we reverse the judgment of the Sixth District Court of Appeals and remand the cause for further proceedings.

Judgment reversed
and cause remanded.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON and O'CONNOR, JJ., concur.

O'DONNELL, J., concurs in judgment only.

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and John P. Kolesar, Assistant Prosecuting Attorney, for appellant.

Michael W. Sandwisch, for appellee.

Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, and F.E. Crawford, Deputy Solicitor, urging reversal for amicus curiae Ohio Attorney General.

William F. Schenck, Greene County Prosecuting Attorney, and Eric A. Baum, Assistant Lucas County Prosecuting Attorney, urging reversal for amicus curiae Ohio Prosecuting Attorneys Association.

Franke Macke Co., L.P.A., and Jason A. Macke; David H. Bodiker, Ohio Public Defender, John A. Bay, Chief Counsel, Legal Division, and James R. Foley, Assistant State Public Defender, urging affirmance for amici curiae Ohio Association of Criminal Defense Lawyers and Ohio Public Defender.

The Supreme Court of Ohio

State of Ohio	Case No. 05-400
v.	JUDGMENT ENTRY
Michael A. Lather	APPEAL FROM THE COURT OF APPEALS

(Filed Sep. 13, 2006)

This cause, here on appeal from the Court of Appeals for Sandusky County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and this cause is remanded to the court of appeals, consistent with the opinion rendered herein.

It is further ordered that costs are assessed pursuant to S.Ct.Prac.R XI(5) and that a mandate be sent to the Court of Common Pleas for Sandusky County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Sandusky County for entry.

(Sandusky County Court of Appeals; No. S03008)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio	Court of Appeals No. S-03-008
Appellee	Trial Court No. 01-CR-726
v.	DECISION AND JUDGMENT
Michael A. Lather	ENTRY
Appellant	Decided: Feb. 18, 2005

* * *

Thomas L, Stierwalt, Prosecuting Attorney, and John P. Kolesar, Assistant Prosecuting Attorney, for appellee.

Michael W. Sandwisch, for appellant,

* * *

(Filed Feb. 18, 2005)

PIETRYKOWSKI, J.

Defendant-appellant, Michael A. Lather, Jr., appeals the February 5, 2003 judgment of the Sandusky County Court of Common Pleas which, following a jury trial, found appellant guilty of trafficking in crack cocaine, in violation of R.C. 2925.03(A)(1), (C)(4)(f), and sentenced him to seven years of imprisonment and a $7,500 mandatory fine. From that judgment and the court's prior judgment denying his motion to suppress, appellant raises the following six assignments of error:

"1) The trial court erred to the prejudice of the defendant in denying defendant's motion to suppress.

"2) The trial court erred to the prejudice of the defendant in calling as the court's witness, Jeffrey Moore, at the request of the prosecuting attorney.

"3) The ruling of the trial court denying the defendant's motion for acquittal was erroneous and the verdict of the jury was against the manifest weight of the evidence.

"4) The trial court erred to the prejudice of the defendant in admitting evidence regarding other unrelated acts regarding the alleged conduct of the defendant that allegedly occurred subsequent in time to the arrest of the defendant herein, which denied the defendant a fair trial.

"5)The conduct and demeanor of the trial judge during the defendant's trial in the presence of the jury was prejudicial to the defendant and denied the defendant a fair trial.

"6) The trial court erred to the prejudice of the defendant in failing to hold a hearing to determine his ability to pay the mandatory drug fine when the trial court previously found the defendant to be indigent for purposes of court appointed counsel."

On August 17, 2001, appellant was arrested in Fremont, Sandusky County, Ohio, following a traffic stop, for allegedly trafficking in crack cocaine earlier in the day in Huron County, Ohio. Thereafter, on August 31, 2001, the Ottawa County Sheriff's Department, concerning an unrelated drug investigation involving appellant, obtained a search warrant through Sandusky County to execute on appellant's alleged residence. Three digital scales were recovered.

On September 6, 2001, appellant was indicted on one count of trafficking in crack cocaine for the August 17, 2001 incident; appellant entered a not guilty plea. Subsequently, appellant filed a notion to suppress all evidence seized during the search of appellant's apartment and vehicle and any statements made by appellant following his arrest after each incident. On October 24, 2002, following a hearing, the trial court denied appellant's motion.

The November 21, 2002 trial on the matter resulted in a hung jury. Thereafter, appellant filed a motion in limine to prevent the state from offering any evidence regarding any charged or non-charged alleged drug dealings involving appellant, for which he had not been convicted. Following a hearing on the matter, the motion was denied.

The second trial commenced on January 29, 2003, and appellant was found guilty. On February 5, 2003, appellant was sentenced to seven years of imprisonment, a $7,500 mandatory fine, and forfeiture of his 1988 BMW and the $3,143 found on appellant's person at the time of his arrest. This appeal followed.

In appellant's first assignment of error he argues that the court erroneously denied his motion to suppress because the August 31, 2001 search warrant was not based on probable cause and, even assuming the warrant's validity, it did not give the officers authority to search for the scales. Appellant further contends that during the August 17 and August 31, 2001 incidents he was not properly advised of his *Miranda* rights.

We first note that when considering a motion to suppress, a trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses.

State v. Mills (1992), 62 Ohio St.3d 357, 366. When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

In reviewing whether the affidavit sufficiently supported the issuance of the search warrant, the role of the trial court and the appellate court is limited as follows:

"In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial judge nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *State v. George* (1989), 45 Ohio St.3d 325, paragraph two of the syllabus.

In determining whether and [sic] affidavit in support of a request for a search warrant provides sufficient information to satisfy the probable cause requirement, the

issuing magistrate must determine whether, "* * * given all the circumstances set forth * * * including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability [that evidence will be found.]" Id. at paragraph one of the syllabus.

The affidavit in this case chronicled the events from appellant's arrest on August 17, 2001, through the following week. Included was information that the affiant/detective had been informed that appellant, prior to his arrest on August 17, 2001, had given a large amount of narcotics to his girlfriend living in Port Clinton, Ottawa County, Ohio. According to the named informant, on approximately August 21, 2001, the narcotics were located in her apartment, in a Black & Decker box under her kitchen sink. The affiant stated that following a consent search of the informant's apartment, a detective recovered a Black & Decker box which contained a "large plastic wrapped package." The package was tested and preliminary results indicated that the substance was crack cocaine in an amount greater than 500 grams.

The affiant further stated that he had been employed with the Ottawa County Drug Task Force for the past five and one-half years and, that based upon this experience, he knows that drug traffickers maintain certain records, secrete contraband, use certain electronic devices to store telephone numbers of customers, keep various drug paraphernalia for packaging, diluting, weighing and distributing drugs, and attempt to secret their profits. Based on the foregoing, the affiant stated that he had reason to believe that appellant, at his Sandusky County residence, had the above property which was used in drug trafficking.

After careful review of the affidavit, we find that the judge had a substantial basis for determining that there was sufficient probable cause to issue a search warrant. Appellant was recently arrested on a drug trafficking charge; and a large quantity of crack cocaine, allegedly his, was recovered in Ottawa County.

Also relating to the issuance of the search warrant, appellant claims that the search warrant did not give the officers the authority to search for and confiscate, inter alia, three electronic scales. Appellant contends that the officers were limited to the items listed on the face of the warrant. The search warrant authorized seizure of the following items:

"a) letters, correspondences, records, or any documentation of any transactions, including but not limited to checking and saving accounts, bank statements, income tax returns, safety deposit keys and/or records, or records of purchases of any and all items. Also, any record, correspondence or photographs that would connect the possessor with a criminal enterprise or to other members of a criminal enterprise. Instruments used to facilitate the criminal enterprise, including but not limited to cell phones and/or pagers and records indicating their purchase and or use in the enterprise. Fruits and/or evidence of the criminal enterprise, such as large sums of cash and other assets."

In *State v. Kobi* (1997), 122 Ohio App.3d 160, this court found that "[e]vidence, not specifically described in a search warrant may be validly seized if, based on evidence known to the officers, the seized items were closely related to the crime being investigated or were instrumentalities

of the crime." Id. at 171, citing *State v. McGettrick* (1988), 40 Ohio App.3d 25, 29.

In this case, the criminal enterprise under investigation was drug trafficking. Digital scales are commonly used as instrumentalities of drug trafficking. Accordingly, we find that the officers did not seize items beyond the scope of the search warrant.

In his motion to suppress, appellant also argued that the police officers, following the August 17 and August 31, 2001 arrests, failed to advise him of his rights as required under *Miranda v. Arizona* (1966), 384 U.S. 436. We will separately examine each arrest.

At the April 18, 2002 suppression hearing, Officer Woolf testified that following appellant's August 17, 2001 arrest, Woolf, at the Fremont Police station, read appellant the Miranda warnings and confirmed that he understood them. Appellant then signed a waiver of rights form which was admitted into evidence.

Appellant testified that Woolf never explained that he was signing a waiver of rights form; Woolf just requested that appellant sign a "group of papers." Appellant testified that he did not understand that anything he said could be used against him. During cross-examination, appellant admitted that he had been arrested on several prior occasions.

According to *Miranda v. Arizona,* before a suspect in police custody is questioned, the suspect:

"must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an

attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

A suspect may waive his Miranda rights provided his waiver is knowing and voluntary. *Edwards v. Arizona* (1981), 451 U.S. 477, 483. In *North Carolina v. Butler* (1979), 441 U.S. 369, 373, the United States Supreme Court explained:

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The court must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some eases waiver can be clearly inferred from the actions and words of the person interrogated."

The issue of waiver is determined by the totality of the circumstances in each case, including the defendant's background, experience and conduct. Id. The state is required to prove only that appellant waived his right to remain silent by a preponderance of the evidence. *Colorado v. Connelly* (1986), 479 U.S. 157.

Upon review of the evidence presented at the suppression hearing, we find that the court did not err by admitting appellant's statements following his August 17, 2001

arrest. Testimony was presented that appellant was read his rights and understood them; he also signed the written waiver form. Further, appellant had completed high school and some college, and had been arrested on prior occasions.

On August 31, 2001, pursuant to the Ottawa County arrest warrant, appellant was arrested and returned to his alleged apartment so he could be present during the execution of the search warrant. Officer Woolf testified that he "Mirandized" appellant by reading from an "Advice of Rights" form. Woolf testified that he did not ask appellant if he understood his rights and he did not asked [sic] appellant if he wished to waive his rights. Woolf also testified that he did not read the waiver of rights language on the back of the "Advice of Rights" form. Woolf stated that it was "standard protocol" for the arresting officer, in this case Sergeant Garza, to read the suspect his *Miranda* warnings. Woolf acknowledged that he never confirmed that Garza, in fact, read appellant his rights. Finally, Woolf stated that he did not interrogate appellant.

Ottawa County Detective Larry St. Clair testified that, during the search, after he found the first digital scale he asked appellant what he used it for. Appellant responded that the prior renter had left it. After St. Clair found two additional scales, he asked appellant if they were his. Appellant again responded that the prior renter left them and he stated that they were not working.

St. Clair stated that he did not read appellant his rights. St. Clair testified that he asked Officer Woolf is [sic] he had read appellant his rights, and relied on Woolf's representation that he had. St. Clair did nothing

to independently verify that appellant understood his rights and waived them.

As set forth above, a *Miranda* waiver need not be expressly made in order to be valid. However, even if the waiver is implied, it must be shown that the suspect, in fact, knowingly and voluntarily waived his rights before making the statement. *State v. Scott* (1980), 61 Ohio St.2d 155, paragraph one of the syllabus, following *North Carolina v. Butler,* 60 L.Ed. 2d 286, 292.

In *Tague v. Louisiana* (1980), 444 U.S. 469, the United States Supreme Court concluded that the petitioner's inculpatory statement was erroneously admitted into evidence where the arresting officer could not recall if he asked petitioner whether he understood the rights as read to him. In *Tague,* the Louisiana Supreme Court concluded that the arresting officer "is not 'compelled to give an intelligence test to a person who has been advised of his rights to determine if he understands them * * *.' " Id. at 469-470, quoting 372 So.2d. 555, 557. Reversing the majority, the United States Supreme Court, concurred with the dissent's analysis, quoting:

" '* * * the majority today creates a presumption that the defendant understood his constitutional rights and places the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' " Id. at 470, quoting 372 So.2d at 558.

In *State v. Murphy* (2001), 91 Ohio St.3d 516, the Ohio Supreme Court noted that "[w]here a suspect speaks freely to police *after* acknowledging that he understands his rights, a court may infer that the suspect implicitly waived

his rights." (Emphasis in original.) (Citations omitted.) Id. at 519. The court noted that "[a] suspect's acknowledgment that he understands his rights should not, perhaps, 'inevitably carry the day,' but such an acknowledgment 'is especially significant when defendant's incriminating statement follows immediately thereafter * * *.'" Id., quoting 2 LaFave, Israel & King, Criminal Procedure (2 Ed. 1999), 592, Section 6.9(d). The court then examined the surrounding circumstances to confirm that the waiver was voluntary. Id.

In this case, Officer Woolf unequivocally testified that he neither asked appellant if he understood his rights nor asked appellant if he wished to waive his rights. Thereafter, Officer St. Clair, without apprising appellant of his rights, questioned him about the digital scales found in the apartment. We do acknowledge that appellant had prior contacts with the criminal justice system and had recently been arrested; appellant had also completed high school and some college. However, in order for appellant to, at minimum, impliedly waive his *Miranda* rights, it must be shown that he understood those rights. Such an understanding may not be presumed. Accordingly, we find appellant's first assignment of error well-taken, in part, as it relates to the August 31, 2001 interrogation.

Accordingly, based on our disposition of appellant's first assignment of error, we find Assignments of Error Nos. II through VI are moot and not well-taken. Because appellant's August 31, 2001 statements were admitted at trial, and because, after review of the entire record we believe that the evidence of appellant's guilt was not overwhelming, we find that the matter must be remanded for a new trial.

On consideration whereof, we find that appellant was prejudiced and prevented from having a fair trial and the judgment of the Sandusky County Court of Common Pleas is reversed. The matter is remanded for a new trial. Pursuant to App.R. 24, court costs are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. /s/ Peter M. Handwork
JUDGE

Mark L. Pietrykowski, J. /s/ Mark L. Pietrykowski
JUDGE

Arlene Singer, P.J. /s/ Arlene Singer
CONCUR. JUDGE

IN THE COMMON PLEAS COURT
OF SANDUSKY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	*	
Plaintiff	*	Case No. 01-CR-726
v.	*	JUDGMENT ENTRY
MICHAEL A. LATHER,	*	(Filed October 24, 2002)
Defendant.	*	

This cause comes before the Court for consideration of a Motion to Suppress filed by the defendant on March 29, 2002, an amended Motion to Suppress filed on April 9, 2002, and a second amended Motion to Suppress filed on April 16, 2002. In these motions, the defendant seeks to suppress items seized from an apartment at 505-½ N. Wayne Street, Fremont Ohio pursuant to a Search Warrant issued by Judge Margaret K. Weaver. and also statements he made while in custody following his arrest. The prosecution stipulated that the only items seized from the apartment that it would be offering as evidence were three electronic scales.

A hearing was held on April 18, 2002. A Fremont Police Officer, T.J. Wolf, testified the defendant had been advised of his "Miranda" rights at the time of his "traffic-stop" arrest, and also at the Fremont Police Station during the booking process; and that the advise [sic] of rights at the police station was captured on video tape, but that the tape had been inadvertently re-used, and was thus not available.

Thereafter, the prosecution advised the Court that the tape had been found; that it had not been re-used and was

available; and the prosecution requested that the hearing be re-opened for the purposes of presenting said video tape in evidence. The Court granted such request.

It was thereafter discovered that the audio portion of the video tape was unintelligible, so the prosecution had an "enhanced" audio tape made of the audio portion of the video tape. The defendant had an opportunity to view the video tape, and listen to the "enhanced" audio tape, and consented to the Court considering these items outside the presence of the defendant.

The Court viewed the video tape, and it could be observed that the defendant and Officer Wolf did have several conversations, and that the defendant did sign several pieces of paper; however, due to the audio being unintelligible, the nature of the conversations, or the pieces of paper, could not be determined. The so-called "enhanced" audio tape was also unintelligible.

The Court is therefore forced to rely on the testimony presented at the hearing, and finds as follows:

The language of the affidavit for the Search Warrant set forth probable cause for the issuance of the warrant, and also contained probable cause for seizure of drug paraphernalia. However, the Search Warrant itself must specifically describe the property to be seized; and in this case the language in the Search Warrant does not specifically authorize the seizure of drug paraphernalia. The only language in the Warrant which could arguable [sic] authorize the seizure of the three electronic scales is "Instruments used to facilitate the criminal enterprise, including but not limited to cell phones and/or pagers and records, . . . ". When the Warrant is read as a whole, it is clear that the criminal enterprise which the defendant is

alleged to be involved in is drug trafficking; and electronic scales are instruments used to facilitate drug trafficking, as stated in paragraph 4(f) of the Affidavit. Therefore, the three electronic scales are admissible in evidence.

The defendant was advised of his Miranda" rights at the time of the "traffic stop" arrest, and he did not request counsel. The defendant admitted that he had graduated from high school, and had attended two semesters at the local community college. There was also testimony that the defendant had a prior felony conviction, and that he had numerous previous contacts with the law. Therefore the Court finds that it was not necessary that the defendant be re-advised of his "miranda" rights. Therefore, statements made by the defendant are admissible.

/s/ Harry A. Sargeant
Judge Harry A. Sargeant, Jr.

cc: Prosecuting Attorney
Michael W. Sandwisch, Esq.